Admin. February 7, 2012

First Supplement to Memorandum 2012-5

New Topics and Priorities

The Commission has received the following new communications relating to its annual review of new topics and priorities:

Some of these communications provide further information regarding ideas that were discussed in Memorandum 2012-5. Other communications present new ideas for consideration, which were not previously discussed. We first describe the communications that provide further information regarding ideas that were already discussed, and then turn to the ones that present new ideas.

FURTHER INPUT ON SUGGESTIONS DISCUSSED IN MEMORANDUM 2012-5

After receiving Memorandum 2012-5, four people took the time to respond to the staff's analysis, or to further explain or bolster their suggestion.

Homestead Exemption: Challenge to Existence of a Dwelling

Attorney John Schaller urges the Commission to address his suggestion without delay:

> As you suggested in your staff memorandum the fix on a procedure for determining whether the dwelling procedures on a levy of writ of execution on real property when there is no dwelling

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting.

> is an easy fix and appears not to take much study and could be done without deferral to later years.
>
> Also as I mentioned there needs to be a procedure by which the existence of and the amount of liens prior to the execution levy can be determined.

Exhibit p. 6. The staff agrees that this topic appears to present a relatively narrow matter of clarification. However, it does not involve a frequently arising circumstance that needs to be addressed immediately. Given the other demands on the Commission's time, **we continue to recommend that the Commission keep this suggestion on hand for further consideration next year.**

Intestate Inheritance by a Half-Sibling

Marlynne Stoddard has provided extensive additional comments on the importance of revising the law governing intestate inheritance by half-siblings. See Exhibit pp. 7-11.

Before addressing Ms. Stoddard's main substantive contention, the staff would like to clarify a matter of procedure. In her letter, Ms. Stoddard suggests that the Commission has already decided against studying the half-sibling inheritance issue next year. *Id.* at 7. Actually, she is describing the staff's recommendation on the issue, not a Commission decision. The Commission has not yet made a decision on the issue. The staff has contacted Ms. Stoddard to clarify this point.

Turning to substantive matters, Ms. Stoddard's main new contention is that existing California law violates the equal protection clause of the U.S. Constitution, because it "*only protects non-marital children, not marital children*." *Id.* at 7 (emphasis in original). In support of this contention she refers to commentary that states:

> State statutes that protect nonmarital children but do not protect marital children whose fathers abandon or fail to support them might be challenged on the basis that they violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. *See* Lowell v. Kowalski, 405 N.E.2d 135 (1980), where the Supreme Judicial Court of Massachusetts granted a nonmarital child standing to challenge the constitutionality of a statute on the basis of disparate treatment of the estates of mothers and fathers.

Id. at 10, *quoting* P. Monopoli, *"Deadbeat Dads": Should Support and Inheritance Be Linked?*, 49 Miami L. Rev. 257 (1994).

The *Lowell* case cited in this commentary was decided under Massachusetts law, and involved very different facts from the situation Ms. Stoddard wants the Commission to address. At issue was a Massachusetts intestacy statute that allowed an out-of-wedlock child to inherit from the child's natural father "only if the parents have intermarried and if the father either has acknowledged the child as his or has been adjudged to be the child's father …." 405 N.E. 2d at 138. In contrast, out-of-wedlock children would be "included among the heirs of their mothers in all instances …." *Id.* at 139. The out-of-wedlock child argued that this scheme violated the Massachusetts Equal Rights Amendment, under which a statutory classification based on sex "is subject to strict judicial scrutiny … and will be upheld only if a compelling interest justifies the classification and if the impact of the classification is limited as narrowly as possible consistent with its proper purpose." *Id.*

The court readily acknowledged that "to differentiate between an illegitimate child's right to inherit from his or her natural mother and that child's right to inherit from his or her natural father is to establish a classification based on sex." *Id.* (citations omitted). The court further concluded that "because the possibility of fraud is usually greater with respect to claims against the estate of a deceased man than against the estate of a deceased woman, … the State has a compelling interest in imposing a stricter standard for establishing an illegitimate child's right to inherit from its father than from its mother." *Id.* at 140. However, the court nonetheless struck down the requirement of intermarriage as unconstitutional, because it was not "as narrow in its impact as is possible, consistent with the purpose of avoiding fraudulent claims against the estate of a man who died intestate." *Id.*

Thus, the appellant in *Lowell* challenged a statutory distinction based on sex, which is a suspect classification subject to strict scrutiny under the Massachusetts Equal Rights Amendment. In contrast, Ms. Stoddard is challenging (1) Probate Code Section 6406, which generally provides that "relatives of the halfblood inherit *the same share* they would inherit if they were of the whole blood" (emphasis added), and (2) Probate Code Section 6452, which provides:

> 6452. If a child is born out of wedlock, neither a natural parent nor a relative of that parent inherits from or through the child on the basis of the parent and child relationship between that parent and the child unless both of the following requirements are satisfied:

(a) The parent or a relative of the parent acknowledged the child.

(b) The parent or a relative of the parent contributed to the support or care of the child.

Neither of these provisions involves a statutory distinction based on sex, comparable to the one *Lowell*. It would be hard to argue that either provision discriminates on the basis of a suspect classification and thus is subject to strict scrutiny or any other form of heightened scrutiny. Although we have not had sufficient time to thoroughly research this matter, the staff is dubious that an equal protection challenge to either provision would be successful.

That is not to say, however, that the statutory scheme is ideal. Perhaps some tinkering might help to achieve the statutory purpose of distributing a decedent's wealth in the manner the decedent would have intended. But past history has shown that this is far from a simple matter. It would not be possible to undertake this type of study at this time, without jeopardizing the Commission's ability to meet its statutory deadlines for other projects. The staff continues to recommend that the Commission **revisit this matter next year, keeping in mind that the area has proved difficult to effectively address.**

Child Support: Presumption Based on Repeated Misconduct

Amy Di Costanzo offers two clarifications made by her lawyer (Stuart MacKenzie) in response to Memorandum 2012-5.

His first clarification focuses on the following statement made by the staff:

> Presumably, Ms. Di Costanzo believes a similar rule should apply with regard to proof of perjury or other dishonest or fraudulent conduct in a child support case — i.e., evidence that a person committed perjury or engaged in other dishonest or fraudulent conduct in a *prior* child support case could be used to help prove that the person was guilty of similar conduct in a *new* child support case.

Memorandum 2012-5, p. 35 (emphasis added). According to Mr. MacKenzie, the issue should not be framed in terms of using perjury in a *prior* case to prove perjury in a *new* case. Exhibit p. 3. Rather, he says "[t]he issue is i) the previous perjury on a particular issue (i.e., financial) is again being made in the *same* case and when that occurs after the second time then ii) invoking a presumption that his/her current claims on the same issue are equally false unless he/she can overcome the presumption." *Id.* (emphasis in original).

Mr. MacKenzie's second clarification is that instead of relying on Evidence Code Section 1109 as a model (as discussed at page 35 of Memorandum 2012-5), "it would be better to analogize with Family Code 3044 which states that it is presumed that a party does not get joint or legal custody of kids if there has been Domestic Violence in the last 5 years unless he/she can overcome the presumption as set out in 3044." Exhibit p. 3. Ms. Di Costanzo plans to attend the upcoming Commission meeting to further explain her views.

While the staff appreciates the clarifications she and her lawyer have provided thus far, the bottom line remains that child support issues tend to be controversial and are not well-suited to being addressed by the Commission. We continue to recommend that the Commission **refrain from getting involved in this matter.**

Civil Discovery: Briefing Schedule for a Petition to Preserve Evidence

At page 37 of Memorandum 2012-5, the staff characterized a petition to preserve evidence as "a relatively uncommon procedure." Barbara Hass "respectfully disagree[s]" with that statement. Exhibit p. 4. She explains:

> In my legal support to my personal injury attorney, I have assisted him in filing several petitions in 2011, and have already filed two in 2012. It is more common than is represented in the memorandum. In addition, in my 30+ years of experience, it is becoming increasingly common for the respondent to the petition to oppose, in whole or in part, the Petition to Preserve Evidence prior to the hearing. This is the reason I stumbled upon this issue of clarification in this statute. I have had two petitions opposed by counsel recently, and there is no direction on how to calculate the deadlines.

Id.

Ms. Hass further states that a petition to preserve evidence is typically filed in a case that has "complex legal issues concerning causation, and major damage issues." *Id.* In her experience, "many respondents in the petition have liability insurance that will retain defense counsel to respond to and appear at the hearing on the petition." *Id.*

The staff is grateful for this additional information about the frequency of petitions to preserve evidence and the contexts in which they are used. However, we remain unconvinced that this topic warrants the Commission's attention at this time, given the legislatively mandated items on the Commission's agenda.

We continue to recommend that the Commission **consider addressing this issue when it has sufficient resources to reactivate its study of civil discovery.**

Ms. Hass' comments did cause the staff to wonder, however, whether selection of an appropriate briefing schedule for a petition to preserve evidence would be a matter of dispute between the personal injury plaintiffs' bar and the personal injury defense bar. **If so, the Commission should be cautious about getting involved.** It might be best to leave the matter to the Legislature to resolve, or to the Judicial Council to address by court rule.

NEW SUGGESTIONS

As described below, the Commission received three comments raising completely new ideas for consideration.

Bonds and Undertakings: References to "Bearer" Bonds and "Bearer" Notes

Attorney H. Thomas Watson requests that the Commission "consider proposing legislation to amend California Code of Civil Procedure sections 995.710, 995.720 and 995.760 so that they no longer refer to 'bearer' bonds or 'bearer' notes, but instead to simply 'bonds or notes.'" Exhibit p. 14. He explains that the proposed amendments are needed "because the U.S. Treasury and the states ceased issuing bearer instruments in 1982." *Id.* He cites a federal regulation (26 C.F.R. 5f 103-1) as support for that proposition. *Id.*

On initial read, this sounds like it might be a straightforward matter of clarification, suitable for the Commission to address pursuant to its authority to "correct technical or minor substantive defects in the statutes of the state without a prior concurrent resolution of the Legislature referring the matter to it for study." Gov't Code § 8298. But the current staff is not familiar with the usage and history of bearer bonds and notes, nor do we consider it likely that the Commission will have any resources available to devote to a topic like this during 2012. We recommend that the Commission **retain the suggestion for further consideration when the Commission conducts its next review of new topics and priorities.** If Mr. Watson wants to pursue the matter more expeditiously, he might consider contacting an appropriate section or committee of the State Bar.

Civil Procedure: Stay of Trial Court Proceeding During Appeal

Mr. Watson also suggests that the Commission consider amending Code of Civil Procedure Section 916 as shown in underscore below:

> (a) Except as provided in Sections 917.1 to 917.9, inclusive, and in Section 116.810, the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order.
>
> (b) When there is a stay of proceedings other than the enforcement of the judgment, the trial court shall have jurisdiction of proceedings related to the enforcement of the judgment as well as any other matter embraced in the action and not affected by the judgment or order appealed from.
>
> (c) The trial court retains jurisdiction to rule on all motions filed pursuant to Code of Civil Procedure sections 629, 630, and 657-663.2, regardless whether an appeal from the judgment or order has been perfected.

Exhibit p. 12. He explains that this amendment "seeks to resolve the anomalous split of authority" on whether a trial court retains jurisdiction to resolve a motion for judgment NOV while a case is stayed during an appeal. *Id.* at 12-13. He believes that the trial court "should retain jurisdiction to rule on all post-trial motions regardless of whether a notice of appeal is perfected." *Id.* at 13. His proposed amendment seeks to accomplish that result.

The Commission is not currently authorized to study this area of the law, and the proposed reform is too significant to fall within the Commission's existing authority to correct technical or minor substantive defects. Because the Commission is already overloaded with other work, seeking authority to study this topic does not seem like a reasonable step at this time. The staff recommends **retaining Mr. Watson's suggestion for further consideration when the Commission conducts its next review of new topics and priorities.** Again, if Mr. Watson wants to pursue the matter more expeditiously, he might consider contacting an appropriate section or committee of the State Bar.

Labor Law: Payment of Employee in Full Upon Termination

Jean Patrick Charles is the CFO and Co-Founder of DrJays.com, "an e-tailer that currently employs over 200 people." Exhibit p. 1.

He writes:

> We typically have 3 to 12 photo shoots annually, spending $5,000-$20,000 per shoot to employ models, stylists, hairdressers, photographers, and to rent locations or equipment. *Regrettably, we may never again do a photo shoot or hire models in California as a result of onerous labor regulation.*

Id. (emphasis added).

In particular, Mr. Charles asserts that "Section 203 stipulates that any employee must be paid in full upon termination." *Id.* He says that although this requirement "appears innocuous, … there are overly broad interpretations as to what constitutes an employee and draconian penalties for running afoul of the rule." *Id.*

The staff presumes that Mr. Charles actually meant to refer to Labor Code Section 201, which says that "[i]f an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately." Labor Code Section 203, referenced by Mr. Charles, just prescribes the penalty for violating this requirement. It provides: "If an employer willfully fails to pay, without abatement or reduction, in accordance with [Section 201] …, any wages of an employee who is discharged …, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action is commenced; but the wages shall not continue for more than 30 days."

To illustrate his point, Mr. Charles tells the following story:

> [C]ase law has ruled that a fashion model, even hired through an agency, is an employee of the company conducting the shoot. Our situation of having checks issued from New York but employees that conduct photo shoots at our distribution center in San Diego resulted in the following: a model hired for $1,250 for a 1 day shoot on February 9, 2008 is now suing us for $37,500 because one week shy of the 3 year statute of limitation, she decided that she is an "employee" and she was "terminated" at the end of the shoot and is therefore due $1,250 per day despite a signed contract with billing terms of 30 days.
>
> Having to spend tens of thousands defending this lawsuit, even if we prevail, has resulted in no photo shoots in California in the past year meaning no hiring of the various professional aforementioned and questions as to whether we should maintain our dozen local photographers. The "gotcha" posturing of the lawyer as well as the opportunistic grab by the model has not only shaken our faith in basic human decency but also demonstrates how burdensome legislation depresses business.

Exhibit pp. 1-2. He urges the Commission to promote job creation by addressing this issue. *Id.*

However, the Commission is not authorized to study labor law, and the issue Mr. Charles raises may be divisive, pitting employer groups against employee organizations. **Unless the Legislature affirmatively seeks the Commission's assistance with this matter, the Commission should leave it to the Legislature to handle.** In this regard, we note that special rules already apply to employees engaged in the production or broadcasting of motion pictures (Lab. Code § 201.5) and employees who work at a venue that hosts live theatrical or concert events (Lab. Code § 201.9). Without conducting some research, we do not know whether these situations are analogous to the use of employees in photo shoots.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

Jean Patrick Charles
CFO & Co-Founder
DrJays.com
853 Broadway, 19th Floor
New York, NY 10003

January 26, 2012

Brian Hebert
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739

Dear Mr. Hebert,

During the State of the Union address, President Obama said:

"Tonight, my message to business leaders is simple: Ask yourselves what you can do to bring jobs back to your country, and your country will do everything we can to help you succeed".

Government has a role to play in regulation; however, compliance is difficult when regulation is counter to common sense or when Federal and State rules conflict.

So, let me make a case for "job creation". Founded in 1999, we are an e-tailer that currently employs over 200 people. We typically have 3 to 12 photo shoots annually, spending $5,000 - $20,000 per shoot to employ models, stylists, hairdressers, photographers, and to rent locations or equipment. Regrettably, we may never again do a photo shoot or hire models in California as a result of onerous labor regulation.

Section 203 stipulates that any employee must be paid in full upon termination. This appears innocuous, but there are overly broad interpretations as to what constitutes an employee and draconian penalties for running afoul of the rule.

Now, this rule might make sense for a farmer paying a day laborer. But case law has ruled that a fashion model, even hired through an agency, is an employee of the company conducting the shoot. Our situation of having checks issued from New

York but employees that conduct photo shoots at our distribution center in San Diego resulted in the following: a model hired for $1,250 for a 1 day shoot on February 9, 2008 is now suing us for $37,500 because one week shy of the 3 year statute of limitation, she decided that she is an "employee" and she was "terminated" at the end of the shoot and is therefore due $1,250 per day despite a signed contract with billing terms of 30 days.

Having to spend tens of thousands defending this lawsuit, even if we prevail, has resulted in no photo shoots in California in the past year meaning no hiring of the various professionals aforementioned and questions as to whether we should maintain our dozen local photographers. The "gotcha" posturing of the lawyer as well as the opportunistic grab by the model has not only shaken our faith in basic human decency but also demonstrates how burdensome legislation depresses business. I can provide further details about the case, *Jenna Simpson versus DrJays.com*, upon request.

In response to the President's challenge, here is a job creation versus regulation issue. Bad legislation can have terrible consequences.

My contact information is listed below if your office might provide some leadership in this matter.

212 334 3652
JPCharles@DrJays.com

Locally, our presence is 7720 Kenamar Court, Suite C, San Diego, CA 92121-2425.

Sincerely,

Jean Charles

California Law Revision Commission
4000 Middlefield Road
Palo Alto, CA 94303-4739

Attn: Ms. Barbara Gaal - Chief Deputy Counsel

Feb. 1, 2012

Re: Child Support Presumption Based on Repeated Misconduct

Dear Sirs and Madams of the California Law Revision Commission,

Thank you for considering my letter to you of 11/6/2010 at the upcoming public meeting in Sacramento. My Lawyer, Stuart I MacKenzie, and I read your staff memorandum and there are two points where your interpretation of the meaning of my letter differs from my original intent.

Please read Mr. MacKenzie's comments to me below:

1) *On the bottom of page 35 they frame your proposal as the fact of perjury in a "prior" case being used in a "new" case. That is incorrect. The issue is i) the previous perjury on a particular issue (i.e.financial) is again being made in the* ***same*** *case and when that occurs after the second time then ii) invoking a presumption that his/her current claims on the same issue are equally false unless he/she can overcome the presumption.*
2) *Instead of relying on the Ev. Code for your proposed rule as suggested in the staff memorandum, it would be better to analogize with Family Code 3044 which states that it is presumed that a party does not get joint or legal custody of kids if there has been Domestic Violence in the last 5 years unless he/she can overcome the presumption as set out in 3044.*

Sincerely,

Amy Di Costanzo

EX 3

EMAIL FROM BARBARA HASS TO BARBARA GAAL (2/2/12)

Dear Ms. Gaal:

Thank you for your correspondence dated January 30, 2012, enclosing the staff memorandum discussing the topics to be considered at the public meeting on Thursday, February 9, 2012. Unfortunately, I will be unable to attend the public meeting. Therefore, please allow this e-mail to respond to the staff memorandum on pages 36-37 concerning my suggested changes to C.C.P., Sections 2035.010 – 2035.050, and specifically page 37, paragraphs 1 and 2.

I respectfully disagree with the memorandum's statement that filing a Petition to Preserve Evidence is an "uncommon procedure." In my legal support to my personal injury attorney, I have assisted him in filing several petitions in 2011, and have already filed two in 2012. It is more common than is represented in the memorandum. In addition, in my 30+ years of experience, it is becoming increasingly common for the respondent to the petition to oppose, in whole or in part, the Petition to Preserve Evidence prior to the hearing. This is the reason I stumbled upon this issue of clarification in this statute. I have had two petitions opposed by counsel recently, and there is no direction on how to calculate the deadlines.

Additionally, it should be noted that when a Petition to Preserve Evidence is filed, it is typically filed in cases that have complex legal issues concerning causation, and major damage issues. Furthermore, many respondents in the petition have liability insurance that will retain defense counsel to respond to and appear at the hearing on the petition.

This appears to be an issue of the legislative intent versus the current day practical use of this statute. The legislative intent may have been to exclude language concerning opposition papers. However, the common use of this statute is to provide a procedure for practitioners and litigants to obtain discovery prior to litigation, which should include a party's right to oppose the petition. If the Commission is concerned about a respondent's right to oral argument at the hearing without the requirement of filing opposition papers, this language can be included in the amendment. Below is proposed language that can be included in the revision concerning the right to oral argument under subparagraph (h).

CURRENT CCP 2035.040:

"(a) The petitioner shall cause service of a notice of the petition under Section 2035.030 to be made on each natural person or organization named in the petition as an expected adverse party. This service shall be made in the same manner provided for the service of a summons.

(b) The service of the notice shall be accompanied by a copy of the petition. The notice shall state that the petitioner will apply to the court at a time and place specified in the notice for the order requested in the petition.

(c) This service shall be effected at least 20 days prior to the date specified in the notice for the hearing on the petition.

(d) If after the exercise of due diligence, the petitioner is unable to cause service to be made on any expected adverse party named in the petition, the court in which the petition is filed shall make an order for service by publication.

(e) If any expected adverse party served by publication does not appear at the hearing, the court shall appoint an attorney to represent that party for all purposes, including the cross-examination of any person whose testimony is taken by deposition. The court shall order that the petitioner pay the reasonable fees and expenses of any attorney so appointed."

PROPOSED ADDITION TO 2035.040:

(f) All papers opposing a petition shall be filed with the court and a copy served on each party at least nine court days, and all reply papers at least five court days before the hearing. The court, or a judge thereof, may prescribe a shorter time.

(g) Notwithstanding any other provision of this section, all papers opposing a motion and all reply papers shall be served by personal delivery, facsimile transmission, express mail, or other means consistent with Sections 1010, 1011, 1012, and 1013, and reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the opposing papers or reply papers, as applicable, are filed. The court, or a judge thereof, may prescribe a shorter time.

(h) A party is not prohibited from presenting oral argument at the hearing on the petition if opposition papers are not filed.

Regards,

Barbara Hass, ACP/CAS
Advanced Certified Paralegal in Trial Practices, Discovery, PI-Wrongful Death
California Advanced Specialist in Civil Litigation
Chain | Cohn | Stiles
1430 Truxtun Avenue, Bakersfield, CA 93301
Telephone: (661) 334-4929
Facsimile: (661) 324-1352

JOHN C. SCHALLER
Attorney at Law

1458 The Esplanade
Chico, California 95926
(530) 893-8891
FAX (530) 893-0124

Tamara M. Trulin
Associate

PLEASE DIRECT ALL
CORRESPONDENCE TO
THE CHICO OFFICE

ALSO OFFICE IN
GRAEAGLE (530) 836-0132
website: schallerjclawoffice.com
email: jcslaw@pacbell.net

February 1, 2012

FEB 3 2012

Barbara Gaal
Chief Deputy Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739

Re: Homestead Exemption: Procedure for Disputing Existence of Dwelling

Dear Ms. Gaal,

As you suggested in your staff memorandum the fix on a procedure for determining whether the dwelling procedures on a levy of writ of execution on real property when there is no dwelling is an easy fix and appears not to take much study and could be done without deferral to later years.

Also as I mentioned there needs to be a procedure by which the existence of and the amount of liens prior to the execution levy can be determined.

Incidentally, using the dwelling procedures we finally got the property sold at a sheriff's sale. There was and is still no dwelling on the property.

Yours truly,

John C. Schaller

John C. Schaller
Attorney at Law

JCS/sjv

EX 6

EMAIL FROM MARLYNNE STODDARD TO BARBARA GAAL (2/3/12)

Re: Equal Protection Under The Law

Dear Ms. Gaal,

Thank you for sending me the Law Revision Commission's Memorandum on proposed topics of study for the coming year. Do I send supplementary comments to you or must they be mailed to the State Capitol, and if so, what address do I use and to whom would they be addressed? My further commentary is found below. If you can forward it to the appropriate person for review at the meeting on February 9th, 2012, at the State Capitol, I would be very appreciative. If you cannot, please advise what I should do. Thank you very much for all you have done so far.

I was greatly disappointed to learn that the Commission decided not to address the issue of inheritance by half-blood siblings, at this time, since it has previously done so and does not currently have sufficient funds. With each passing year, Estates will continue to be unfairly distributed to those whom a decedent might have least wanted to have his property given (as in my brother's case) over those with whom a decedent had a loving relationship, who were a functional member of his own family having grown up in the same household, and who were full-blood relatives. The bond that any close relationship builds is undeniable, but it is even closer in my brother's and my sad case, because we were denied support and care by our father. The issue of intestate inheritance by half-blood siblings would not keep coming up before the Commission if it were fair to all parties involved. In my brother's case, it is horrifically unfair.

There needs to be a requirement of a proven relationship between half-siblings and a decedent before they are allowed to inherit from a decedent as a full-sibling does. The State of California requires that a relationship must exist for the purpose of determining intestate inheritance by, through, or from a person and the person's natural parents, regardless of the marital status of the natural parents. Moreover, California also requires that there be a relationship of parent and child between an adopted person and the person's adopting parent or parents. However, in the case of out-of-wedlock children, not only is a relationship required between the non-marital child and the natural parent, but California has deemed that neither a natural parent nor a relative of that parent inherits from or through the child on the basis of the parent and child relationship between that parent and the child unless both of the following requirements are satisfied: (a) The parent or a relative of the parent acknowledged the child. (b) **The parent or a relative of the parent contributed to the support or the care of the child.**

This California Probate Code Section 6452 requires that a parent must have contributed to the support of a non-marital child in order that he or his relatives might inherit from the child. **This statute only protects non-marital children, not marital children.** This clearly is a violation of the Equal Protection Clause of the Fourteenth Amendment to the U. S. Constitution that requires a state to provide equal protection under the law to all people within its jurisdiction. Why does this statute only protect **non-marital children** when **marital children** in the same circumstances are not protected? This unconstitutional California law needs to be amended immediately so that it provides

equal protection under the law to all children who were denied support or care, whether they were the product of a marriage or not.

As you may remember, my parents lived in Hawaii for the majority of their 11 year marriage. My mother told me that my father had one adulterous relationship after another during that time. Late in their marriage, they decided to have children and my brother, Jim, and I were the product of this decision. My brother was born in Honolulu in May of 1945, and then sometime in late 1945 or in early 1946, my parents moved to Los Angeles. I was born in L. A. in September of 1946. Not long afterwards, my father went on a business trip to Las Vegas where he met another woman. When he returned home to L. A., he informed my mother that he was moving back to Hawaii, and that he would let her know when she, my brother, and I could join him. Mother was told by friends that he had met this woman in Las Vegas and that he was taking her to Hawaii to live with him. Being heartbroken and, no doubt, fed up after so many years of infidelity, mother filed for divorce, and my father moved to Hawaii with that woman. My brother was just about a year and a half old and I was only a few months old. My parent's divorce became final when I was 2 years old, and then my father married that woman with whom he was living, and they subsequently had two children. These children grew up in my father's home and enjoyed his attention and care while he was telling my mother that "business was bad" and that he could not afford to pay her the Court mandated Child Support for the care of my brother and me. My mother unfortunately believed him and did not take him back to Court, and my father did not support us. My mother scrimped on everything and lived frugally to make ends meet.

My brother, Jim, passed away October 29, 2010, without a Will and now these half-siblings are demanding 2/3rds of my brother's Estate. My brother had never met these half-siblings and did not want to know them. We did not call, write, or have any relationship with them at all, and they made no effort to have a relationship with us either. They were not part of our family. When they surfaced months after my brother had died demanding 2/3rds of my brother's Estate, I was shocked beyond description. My brother promised his Estate to me twice during the summer prior to his death, and these individuals never came to mind, nor were they part of our conversation at all. To give them any part of his Estate would be a gross miscarriage of justice and contrary to my brother's wishes. Our father did not support us as children, and these half-siblings enjoyed his support and care. Do you think that this is fair??? I assure you that it is not.

It is unconstitutional for the State of California not to provide equal protection under the law to all people within its jurisdiction. The California Probate Code Section 6452 only protects non-marital children when a parent has refused support but it should also offer protection to a marital child when support has been refused.

California Probate Code
Section 6452:

> If a child is born out of wedlock, neither a natural parent nor a relative of that parent inherits from or through the child on the basis of the parent and child relationship between that parent and the child unless both of the following requirements are satisfied:
>
> (a) The parent or a relative of the parent acknowledged the child.

(b) The parent or a relative of the parent contributed to the support or the care of the child.

The Uniform Probate Code Article II Section 2-114 treats marital and non-marital children the same in these circumstances which would be in line with the Constitution of the United States. See the below information from *"Deadbeat Dads": Should Support and Inheritance Be Linked?*, by Paula A. Monopoli, page 270:

> The Uniform Probate Code now also prevents all abandoning or nonsupporting fathers from taking. Prior to the major revisions to Article II, in 1990, the UPC linked support and inheritance only in the case of nonmarital fathers.[49] As previously discussed, this presumably was due to the focus on proving paternity in cases involving nonmarital children and inheritance.
>
> The pertinent intestacy provision of the revised UPC, section 2-114, no longer distinguishes between marital and nonmarital fathers. It prohibits both fathers and mothers who do not support their children from taking from those deceased children regardless of marital status.[50] That statute reads in pertinent part:
>
> > (a) Except as provided in subsection ... (c), for purposes of intestate succession by, through, or from a person, an individual is the child of his [or her] natural parents, regardless of their marital status. The parent and child relationship may be established under [the Uniform Parentage Act] ....
> >
> > ....
> >
> > (c) Inheritance from or through a child by either natural parent or his [or her] kindred is precluded unless that natural parent has openly treated the child as his [or hers], and has not refused to support the child.[51]

The Uniform Probate Code Article II Section 2-114, which has been adopted by many other states, mandates if a father failed to provide support for his child, neither he nor his kindred are allowed to inherit from that child. California is definitely treating non-marital and marital children unequally under its intestate law. The UPC is treating all children equally under the law and is providing the same measure of protection to both non-marital and marital children from parents (and their kindred) who have denied them support or care.

Paula A. Monopoli believes that a statute that protects only non-marital children from a parent and his relatives from inheriting if that parent has not supported or cared for them is unconstitutional since it violates the Equal Protection Clause of the Fourteen Amendment of the U. S. Constitution. A state is required to provide equal protection under the law to all people within its jurisdiction. **Ms. Monopoli states that those statutes that do not protect marital children** (whose father's have failed to provide support or care) in the same way that they protect non-marital children **"...might be challenged on the basis that they violate the Equal Protection Clause of the**

Fourteenth Amendment to the U.S. Constitution." See the below footnotes on page 264 from her work entitled: *"Deadbeat Dads": Should Support and Inheritance Be Linked?*

> 24. State statutes that protect nonmarital children but do not protect marital children whose fathers abandon or fail to support them might be challenged on the basis that they violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. *See* Lowell v. Kowalski, 405 N.E.2d 135 (1980), where the Supreme Judicial Court of Massachusetts granted a nonmarital child standing to challenge the constitutionality of a statute on the basis of disparate treatment of the estates of mothers and fathers.
>
> 25. *See supra* note 8 regarding the interaction of forced heirship and unworthy heirs in civil law systems.

The California Probate Code Section 6452 statute that only protects non-marital children from fathers who refused them support (by preventing that parent and his kindred from inheriting) is unconstitutional, because it does not provide equal protection under the law. It does not also protect marital children in the same exact circumstances. I agree with Ms. Monopoli that it is in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution which requires each state to provide equal protection under the law to all people within its jurisdiction. Our father refused to support my brother and me. We should have the same right to protection under the California Probate Code Section 6452 that non-marital children have. To not protect marital children under this Section is unconstitutional and discriminatory.

In addition, not only was our father a "Deadbeat Dad", a bad parent, and an unworthy heir, **he was abusive, especially to my brother, Jim.** When Jim contacted our father in the mid-1980s and revealed to him that he was gay, our father hurtfully responded, **"I hope you hurry up and get AIDS and die!"** Jim never tried to contact him again after that. Can you imagine your father telling you that he hoped you would contract AIDS and die? When Jim told me this, **he just cried and cried** as I did also for him. It broke his heart (and mine when Jim told me) to hear such a horrific statement filled with such hatred from our father. Our father died a few years later in 1986 but he never spoke to my brother again. My brother later died of a massive heart attack on October 29, 2010, and I feel that our father's evil statement to him, as well as his rejection of us, may have played a role in his early death since my brother never got over his broken heart. Jim was an exceptionally kind and sweet person and he was loved by all who knew him. It has been an extremely painful life for my brother and me, and now, the children that our father had with the woman who broke up my parent's marriage have swooped in like vultures to take the majority of my brother's Estate. Why should these children of our father, who did not support us, profit at all from my brother who was so greatly hurt by our father? The California law protects non-marital children in this very circumstance but does not protect martial children. Why is the law so very unfair? I certainly believe that the California Probate Code Section 6452 is unconstitutional and needs to be immediately amended to include marital children under its protection when a father has refused support. **The marital status of the parent at the child's birth is not the issue, but**

whether the parent has refused to support that child. There is no equal protection under the law in California for marital children in this instance if this statute is not immediately changed. Where are equality and equity as they relate to this issue in California?

Please amend this horrifically unjust California statute Section 6452 that discriminates against married children who have not been supported. Equal protection under the law is a Constitutional right given to citizens of the United States under the Fourteenth Amendment, and **the U. S. Constitution takes precedence over State law.** I ask that this statute be amended without delay and be made retroactive to the date of my brother's death (on 10-29-10) on the basis of its unconstitutionality in order to give equal protection to my deceased brother so that his Estate will not be inherited by the children that our father had after our parents were divorced since our father refused to care for and support us.

I sincerely thank you for your time and attention to this most important of matters,

Marlynne Stoddard

EMAIL FROM H. THOMAS WATSON (1/27/12, #1)

Re: Proposed amendment to CCP § 916

Dear Law Revision Commission Staff Members,

I request the California Law Revision Commission consider the below proposed amendment to section 916 of the California Code of Civil Procedure. The rational and authority for this proposed amendment follows the proposal.

Very truly yours,

H. Thomas Watson - **HORVITZ & LEVY LLP**
15760 VENTURA BLVD., 18TH FLOOR
ENCINO, CA 91436-3000
MAIN: 818.995.0800 - DIRECT: 818-995-5803
WWW.HORVITZLEVY.COM - HTWATSON@HORVITZLEVY.COM

Proposed Amendments:

Code Civ. Proc., § 916:

(a) Except as provided in Sections 917.1 to 917.9, inclusive, and in Section 116.810, the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order.

(b) When there is a stay of proceedings other than the enforcement of the judgment, the trial court shall have jurisdiction of proceedings related to the enforcement of the judgment as well as any other matter embraced in the action and not affected by the judgment or order appealed from.

(c) The trial court retains jurisdiction to rule on all motions filed pursuant to Code of Civil Procedure sections 629, 630, and 657-663.2, regardless whether an appeal from the judgment or order has been perfected.

RATIONAL FOR PROPOSED AMENDMENT:

The proposed amendment seeks to resolve the anomalous split of authority described by the following treatise:

"(a) [7:13] New trial motion: A stay on appeal does not affect the trial court's jurisdiction to hear and determine a new trial motion ... even after an appeal has been taken from the underlying judgment. [*Varian Med. Systems, Inc. v. Delfino, supra,* 35

C4th at 191, 25 CR3d at 307; *Weisenburg v. Molina* (1976) 58 CA3d 478, 485–486, 129 CR 813, 817; and see ¶ 3:75]

"An order granting a new trial is considered to be "independent of and collateral to" the underlying judgment because the order is separately appealable. [*Estate of Walters* (1919) 181 C 584, 585, 185 P 951, 952; and see ¶ 2:138 ff.]

"(b) [7:14] Motion for judgment NOV? But there is a split of authority on whether trial courts retain jurisdiction to hear and determine a motion for judgment NOV pending a stay by appeal. [See *Weisenburg v. Molina, supra,* 58 CA3d at 486, 129 CR at 817—stay divests trial court of jurisdiction to hear motion; compare *Foggy v. Ralph F. Clark & Associates, Inc.* (1987) 192 CA3d 1204, 1212–1213, 238 CR 130, 134–136—trial court retains jurisdiction to hear motion]

"• [7:15] Comment: In support of the view upholding the trial court's jurisdiction, analogy may be drawn to the "collateral proceedings" treatment given a motion for new trial (above). This reasoning was adopted by the court in *Foggy, supra*: "We are at a loss to understand how a motion for judgment notwithstanding the verdict can be considered as concerned with 'matters embraced' in or 'affected' by the judgment appealed from, while a motion for new trial is not." [*Foggy v. Ralph F. Clark & Associates, Inc., supra,* 192 CA3d at 1213, 238 CR at 136]

"By the same token, the contrary view may find support by analogy to the reasoning in *Estate of Walters* (¶ 7:13): i.e., arguably, an order granting judgment NOV is not "collateral" to the underlying judgment for purposes of trial court jurisdiction pending appeal because the order is not separately appealable (see ¶ 2:148)."

(Eisenberg, Horvitz, & Wiener, Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group 2011) ¶¶ 7:13-7:15, pp. 7-8 to 7-9.)

The trial court should retain jurisdiction to rule on all post-trial motions regardless whether a notice of appeal is perfected. In some cases, a notice of appeal must be filed to stay enforcement of a judgment before the trial court has an opportunity to rule on post-trial motions. Although this does not affect the court's ability to grant a new trial, there is uncertainty whether the court retains jurisdiction to grant other post-trial motions. The proposed amendment removes that uncertainty, and specifies that the trial court does retain jurisdiction to grant all post-trial motions that may obviate the need for an appeal.

EMAIL FROM H. THOMAS WATSON (1/27/12, #2)

Re: Proposed amendment to CCP §§ 995.710, 995.720 & 995.760

Dear Law Revision Commission Staff Members,

I request that the California Law Revision Commission consider proposing legislation to amend California Code of Civil Procedure sections 995.710, 995.720 and 995.760 so that they no longer refer to "bearer" bonds or "bearer" notes, but instead to simply "bonds or notes." The proposed amendment is needed because the U.S. Treasury and the states ceased issuing bearer instruments in 1982. (See 26 C.F.R. 5f 103-1.)

H. Thomas Watson - **HORVITZ & LEVY LLP**
15760 VENTURA BLVD., 18TH FLOOR
ENCINO, CA 91436-3000
MAIN: 818.995.0800 - DIRECT: 818-995-5803
WWW.HORVITZLEVY.COM - HTWATSON@HORVITZLEVY.COM

Proposed Amendments:

Code Civ. Proc., § 995.710:

(2) ~~Bearer b~~Bonds or ~~bearer~~ notes of the United States or the State of California. The "deposit" of a bond or note shall be accomplished by filing with the court, and serving upon all parties and the appropriate officer of the bank holding the bond or note, instructions executed by the person or entity holding title to the bond or note that the Treasurer for the County where the judgment was entered is the custodian of that account for the purpose of staying enforcement of the judgment, and that the title holder assigns to the Treasurer the right to collect, sell, or otherwise apply the bonds or notes to enforce the judgment debtor's liability pursuant to Code of Civil Procedure section 995.760.

Code Civ. Proc. § 995.720. Market value of ~~bearer~~ bonds or ~~bearer~~ notes; stipulation; determination:

(a) The market value of ~~bearer~~ bonds or ~~bearer~~ notes shall be agreed upon by stipulation of the principal and beneficiary or, if the bonds or notes are given in an action or proceeding and the principal and beneficiary are unable to agree, the market value shall be determined by court order in the manner prescribed in this section. A certified copy of the stipulation or court order shall be delivered to the officer at the time of the deposit of the bonds or notes.

Code Civ. Proc. § 995.760. Payment of amount of liability; order of court; sale of ~~bearer~~ bonds or notes; distribution

(a) If the principal does not pay the amount of the liability on the deposit within the time prescribed in Section 995.750, the deposit shall be collected, sold, or otherwise

applied to the liability upon order of the court that entered the judgment of liability, made upon five days' notice to the parties.

(b) ~~Bearer bonds~~ or ~~bearer~~ notes without a prevailing market price shall be sold at public auction. Notice of sale shall be served on the principal. ~~Bearer bonds~~ or ~~bearer~~ notes having a prevailing market price may be sold at private sale at a price not lower than the prevailing market price.

Rational for Proposed Amendment:

The U.S. Treasury and the states ceased issuing bearer instruments in 1982. (26 C.F.R. 5f 103-1.) Today, the purchase of a U.S. Treasury bond or note is simply noted in an account entry at a federal reserve bank.